IN THE

Supreme Court of the United States

..... Term, ...

No. 5172

HAROLD HOBART,
Petitioner,

v.

MICHAEL P. O'BRIEN,
Respondent.

No. 5173

HAROLD M. HOBART,
Petitioner,

v.

JOHN G. DONOVAN ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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JURISDICTION

The jurisdiction of this Honorable Court to heat and determine this case is based upon Title 28, Section 1254 (1) of the U. S. Code.

STATEMENT OF THE MATTER INVOLVED

This petition is based upon discrepancies which occurred in the trial of an motor vehicle accident case in

the United States District Court for the District of Massachusetts during the period of November 29, 1955 through December 9, 1955, the verdict of the jury having been returned early on the morning of December 10, 1955. Said automobile accident occurred between 1:30 and 2 o'clock on the afternoon of June 21, 1952. There were companionate cases, one of which was brought by Dr. Harold M. Hobart of Washington, D. C., against John G. Donovan and Michael P. O'Brien of Massachusetts and the other by Michael P. O'Brien against Dr. Hobart. This petition is filed on behalf of Dr. Hobart. On the day and at the time in question Dr. Hobart was driving a Chrysler passenger automobile in a westerly direction on Route 2 away from Boston, Massachusetts. Michael P. O'Brien was driving an oil truck in an easterly direction on the same highway. Said truck was owned by John G. Donovan who was doing business in the name of Utility Oil Company. Mr. O'Brien was an employee of Mr. Donovan. The highway in question was normally a three lane road with the lanes marked by white lines. As Dr. Hobart passed through the town of Concord on this road and approached the town line between Concord and Acton, the lane in which he was traveling was obstructed by holes, piles of dirt, barricades and warning signs. These obstructions began some 1000 feet east of the scene of the accident. By reason of these obstructions, the defendant was obliged, as were drivers of other westbound vehicles, to drive in the middle lane some distance before reaching the place in the roadway where the accident in question occurred.

Mr. O'Brien was driving the truck owned by Mr. Donovan in an easterly direction on the highway in question prior to this accident. The collision in question occurred while Dr. Hobart was traveling in the center lane and was passing part of the construction work which blocked off the use of the northerly lane. The Exhibits which

constitute pages 565, 571, 573, 575, 577, 579, 581, 583, 585, 587, 589, 591, 593, 595, 597, 599 and 601 of the "Consolidated Record Appendix to the Briefs for the appellants" in the United States Circuit Court of Appeals for the First Circuit, said exhibits being in Volume 2 of said Consolidated Record Appendix show how the truck driven by Mr. O'Brien pushed the passenger vehicle driven by Dr. Hobart across the roadway and against a guard rail which ran parallel to the northernmost edge of the highway. In doing so the truck driven by Mr. O'Brien also collided with a passenger vehicle driven by one Robert Whitney, which said automobile was proceeding in a westerly direction in back of the vehicle driven by Dr. Hobart. All three vehicles were severely damaged. Dr. Hobart and Mr. O'Brien suffered personal injuries. The jury in the United States District Court for the District of Massachusetts returned a verdict for Mr. O'Brien against Dr. Hobart in the sum of SIXTY ONE THOUSAND DOLLARS ($61,000.00) and the Clerk of the United States District Court for the Eastern District of Massachusetts added interest to the judgment from the time of the accident until the entry of the verdict. Upon consideration of the motions for Judgment N.O.V. and for a New Trial, the Judge of the court below ordered a remittitur in the sum of THIRTEEN THOUSAND DOLLARS ($13,000.00) and counsel for Mr. O'Brien filed a remittitur in that amount. The United States Court of Appeals for the First Circuit affirmed the judgment of the court below.

During the course of the trial in the United States District Court for the District of Massachusetts counsel for Mr. O'Brien, Michael Prendergast, Esquire, made derogatory references to Thomas H. Mahony, Esquire, one of the attorneys for Dr. Hobart. Said remarks during the introduction of evidence at the trial of the case are as follows:

First, as set forth on pages 99 and 100 of the Consolidated Record Appendix to Briefs for Appellants in the United States Court of Appeals for the First Circuit, same being in Volume 1:

> "Mr. Mahony: May I take a look at it?
> Mr. Prendergast: Oh, sure (handing)—but you won't tell us the truth.
> Mr. Mahony: Well, I do object to that.
> The Court: All right counsel doesn't mean anything by that.
> Mr. Prendergast: No, no, no."

Second, as found on page 201 of said Consolidated Record Appendix:

> "Q. So that the only use of the car in 1953 was to drive you over to a filling station where you hung around all day?
> A. That's right.
> Mr. Prendergast: He didn't say 'all day'.
> "A. (Continuing) Oh, not all day.
> Mr. Prendergast: You have to watch these fellows, Mr. O'Brien. They'll sneak in words you never were dreaming of."

Third, as found on page 275 of the Consolidated Record Appendix:

> "Mr. Mahoney: I don't think Mr. Mahoney's status is a fact, but I am in now.
> Mr. Prendergast: You are in up to your neck."

The references to Mr. Mahony by Mr. Prendergast in closing argument are as follows:

> "No matter what my friend Mr. Mahony may say, and I am sure if Mr. Mahony ever gets to the age Michael O'Brien is at and loses part of his lung, he will be the one big fellow to cry about it, and don't forget it, and he will regret the day he stood up in front of 11 people and attempted to belittle the situation. (Consolidated Record Appendix page 520).
> Just as I submit, if he (meaning Mr. Malony) was trying to be fair and square, you people know there

are thousands of doctors in Boston." (Consolidated Record Appendix page 523).

He (meaning Mr. Mahony) twists the facts again and he says for years before this accident he (meaning Mr. O'Brien) was only working part time." (Consolidated Record Appendix page 525).

There were other derogatory remarks by Mr. Prendergast regarding Mr. Mahony during the trial which were pointed out in the "Brief in Support of Motions For a New Trial and For Judgment NOV" in the United States District Court For the District of Massachusetts but were not pointed out to the United States Court of Appeals for The First Circuit. Counsel for the Petitioner, Hobart, believes that it would be inappropriate to rely upon any references not specifically pointed out in the Brief in the United States Court of Appeals for the First Circuit, and, therefore, relies entirely upon the foregoing with regard to misconduct of counsel and failure of the trial Judge to properly admonish counsel and instruct the jury regarding same.

During the course of his argument Mr. Prendergast made the following reference to alleged testimony of the witness John H. Robinson, who appeared as a witness in his capacity as the Superintendent of the Water and Sewer Department for the town of Concord, Massachusetts:

"I asked him for all the information he could give me which would either help or hurt, and we got talking and I tried to get him to get the records and when I tried to talk about pictures, I tried to get those and then finally in disgust he says if the doctor was over on his own side of the road, this accident wouldn't have happened." (Consolidated Record Appendix, page 518).

Counsel for Dr. Hobart have searched the transcript to find out whether or not any evidence was introduced from the witness Robinson which could possibly furnish

the basis of such an argument. It is believed that Mr. Prendergast must have been referring to the following part of the testimony of the witness Robinson and the arguments regarding admissibility in connection therewith as set forth in the Consolidated Record Appendix at page 375 as follows:

> "Q. All right. Now, then, let me ask you something, I hope I am not treading on mistrial ground, in view of your testimony, I am going to ask you, do you remember saying there would only be two holes open at one time?
>
> "A. No, sir.
>
> "Q. Do you remember saying to the woman when she asked some questions, do you remember saying, 'Why didn't he stay over in the right lane, it was available for traffic?'"
>
> Mr. Mahony: Wait a minute, objection.
>
> Mr. Prendergast: In view of his testimony, let the judge decide it. I press the question of the witness.
>
> The Court: I will allow the question.
>
> The Witness: Yes, sir, I did.
>
> "Q. You said that, didn't you?
>
> "A. Yes, sir.
>
> "Q. You would not have made a statement like that if the road was blocked on the right hand side of the road would you?
>
> Mr. Mahony: Again I object."

The foregoing with regard to Mr. Prendergast's reference to Mr. Robinson's testimony was pointed out to the Trial Judge in the "Brief in Support of Motion For a New Trial and for Judgment N.O.V. and in one of the Briefs filed in the United States Court of Appeals For The First Circuit.

The Circuit Court of Appeals For The First Circuit did not deal with the matter of Mr. Prendergast's improper argument regarding the testimony of the witness Robinson in their written opinion. Instead, said opinion deals with the admissability of evidence from the witness Robinson (Page 15 of the "Opinion of the Court" which

is the Appendix hereto,) and which made reference to the testimony of the witness Robinson as set forth on page 376 of the Consolidated Record Appendix. The point made on page 15 of the "Opinion of the Court" with regard to whether Mr. Mahony said "I certainly do" or "I certainly do not" is completely separate and apart from and secondary to the point that Mr. Prendergast referred in his argument to a statement *allegedly introduced in evidence by the witness Robinson but not in fact so introduced.*

Counsel for Mr. O'Brien also used arguments which are believed to have been calculated to appeal to the sympathy of the jury and to prejudice them against Dr. Hobart. Said references are as follows:

In the argument of Robert H. Daley, Esquire, as found on page 500 of the Consolidated Record Appendix:

> "I had intended, as I heard Mr. Mahony outline a scheme of argument to you in which he discussed damages first and went to liability—I had intended, listening to him, to adopt that scheme and to discuss with you, when it came my turn, first the question of damages, the comparatively minimal (702) damages that even Dr. Hobart, on his best evidence has when you listen to the overwhelming injury that Mr. O'Brien had suffered."

In the argument of Michael Prendergast, Esquire, as set forth on page 513 of the "Consolidated Record Appendix:"

> "After listening to these gentlemen, it seems to me I have not only wasted my time and my money, and don't think you buy these pictures for 10 cents, but I am wasting your time and then I am wasting the Court's time".

As set forth on pages 513 and 514 of the "Consolidated Record Appendix":

> From the very beginning when I got into this case, I was out to get the facts, the truth and I spent my

money to do it and I have spent my money to convince you people my main was right and that the pictures those people brought in to try to convince you we were wrong proved we were right.

As set forth on page 515 of the "Consolidated Record Appendix":

> I have spent money to get this for you and I have spend money that will help you and I hope that I haven't thrown it away."

There were six witnesses who testified at the trial of this case and who were actually present at the collision in question, namely, the litigants Dr. Hobart and Mr. O'Brien, Mrs. Irma Belk Hobart, Mr. Robert Whitney, Mrs. Lillian Whitney, and Mr. Joseph Mullaney. There can be no question but that the sum total of the testimony of these witnesses adds to the inescapable conclusion that the verdict of the jury of the United States District Court for the District of Massachusetts was contrary to the evidence. The inescapable conclusion is that the truck driven by Mr. O'Brien was well over to the left of the line which defined the lane for traffic in which he should have been driving. This testimony of the eyewitnesses was enhanced in weight by the testimony of the two police officers namely Americo J. Sousa and Sgt. Daniel F. Driscoll. The testimony of these officers revealed that the tire marks of the truck driven by the litigant O'Brien, even as same can be seen in the exhibits in Volume 2 of the Consolidated Record Appendix, showed that the truck driven by Mr. O'Brien was well over to the left of the line which defines the lane in which he should have been traveling. Mr. O'Brien testified at the trial to the effect that at the last moment the automobile driven by Dr. Hobart veered to the left. With great skill in cross examination counsel for Mr. O'Brien caused Mr. Whitney to say that Dr. Hobart's vehicle had veered slightly to the left just before the accident. This was the only corroboration of Mr. O'Brien's story. The very

obvious fallacy of his story however is that Mr. O'Brien contended that the left front of the automobile driven by Dr. Hobart ran into the back of the left front wheel of the truck which he was driving. The impossibility of such a story, as has been pointed out both in the Motions subsequent to trial in the United States District Court for the District of Massachusetts, and in the United States Court of Appeals for the First Circuit, is as shown in defendant's Exhibit E-12 which is depicted on page 593 of Volume 2 of Consolidated Record Appendix. Said picture shows the running board at the back of said front wheel of said truck and the door above said running board. Not a splinter or sliver has been removed from the running board and there is no dent in the door. This vital piece of physical evidence alone shows the impossibility of Mr. O'Brien's story. Much has been made of the fact that, as a matter of trial strategy, counsel for Mr. O'Brien called Dr. Hobart to the stand early in the trial and that Dr. Hobart became confused and testified at that time that it was the right front of the truck which made contact with the left front of the automobile he was driving. Counsel for Dr. Hobart deemed it advisable not to make an effort to correct this testimony on cross examination but to await the calling of Dr. Hobart as a witness in his own behalf and allow him to then make the correction. Quite obviously an admitted mistake in testimony by Dr. Hobart as to which side of the front of the truck ran into the automobile he was driving lends no credence to the ridiculous story told by Mr. O'Brien. Efforts by counsel for Dr. Hobart to prove the inconsistency of Mr. O'Brien's testimony at the trial in the United States District Court for the District of Massachusetts and in the testimony which he gave when he was charged with and found guilty of "Failing to Keep to the Right When View Is Obstructed", Chapter 89 Section 4 of the Annotated Laws of Massachusetts, were so limited by the Trial Judge in the United States Dis-

trict Court for the District of Massachusetts that when finally the privilege of examination was extended, trial counsel for Dr. Hobart was apparently concerned with the possibility that such examination within the limits placed thereon might result in grounds for mistrial and thereby waived the opportunity to so cross examine. Testimony referred to herein above is set forth or referred to by page numbers under the heading "Argument."

Since the preparation of this Petition for Writ of Certiorari, Washington counsel for Dr. Hobart has received a copy of the "Amended Judgment" of the United States District Court for the District of Massachusetts dated June 27, 1957 and has, therefore, included same in the appendix hereto. Washington counsel for Dr. Hobart had no knowledge of any recent "Motion to Vacate Judgment" in said court.

QUESTIONS PRESENTED

The question is whether or not the courts below erred in not granting a new trial in the United States District Court for the District of Massachusetts or a reversal in the United States Court of Appeals for the First Circuit upon an abundant showing that derrogatory comments by counsel for Mr. O'Brien regarding counsel for Dr. Hobart were tied in with derrogatory statements in his argument by said counsel for Mr. O'Brien regarding counsel for Dr. Hobart.

The question is whether or not the courts below erred in not granting a new trial in the United States District Court for the District of Massachusetts or a reversal in the United States Court of Appeals for the First Circuit, it being pointed out to each court that counsel for Mr. O'Brien made a reference to testimony of the witness John H. Robinson in the argument of counsel for Mr.

O'Brien and that such reference was outside of the scope of the testimony of the witness Robinson.

The question is whether or not the courts below erred in a failure of the United States District Court for the District of Massachusetts to grant a new trial or for the United States Court of Appeals for the First Circuit to order a reversal upon a showing to the effect that the argument of counsel for Mr. O'Brien was of such a nature as would have incited the sympathies of the jury in favor of their client and prejudiced the jurors against Dr. Hobart.

The question is whether the Courts below erred in not granting a new trial in the United States District Court for the District of Massachusetts or a reversal in the United States Court of Appeals for the First Circuit upon an abundent showing to the effect that the verdict returned by the jury in the United States District Court for the District of Massachusetts was contrary to the evidence adduced at trial, including not only the testimonye of witnesses but also the physical evidence, as set forth in the Consolidated Record Appendix to Briefs for the appellants in the United States Court of Appeals for the First Circuit.

ARGUMENT

It is respectfully submitted that there are special and important reasons why this Honorable Court should grant this Petition for Writ of Certiorari and upon consideration of this case reverse the decision of the United States Court of Appeals for the First Circuit and order a new trial. Indeed, if the judgment entered against Dr. Hobart is allowed to stand enforceable, in the light of discrepancies pointed out hereinabove, a new chapter will have been written in our law with regard to improper conduct of counsel, failure of the trial judge to take adequate and proper corrective action regarding such

conduct and the upholding of a verdict which is so clearly contrary to the weight of the evidence as to defy all that is reasonable.

The points upon which this petition is based, although interrelated, can be divided into the four sections as expressed in the four "Questions Presented" hereinabove. In the interest of clarity, each will be dealt with as a sub-section of this argument.

Point re: Derogatory Comments by Counsel for Mr. O'Brien at trial as tied in with Derogatory Comments in closing Argument.

With regard to the argument of counsel, the opinion of the United States Court of Appeals for the First Circuit came to the following conclusion as set forth on page 11 of said opinion:

> "Another ground for Hobart's motion for a new trial in these cases was that the verdict was influenced by wholly improper argument of appellees' counsel. In pursuing this contention on appeal, Hobart largely points to statements made by O'Brien's counsel in his summation to the jury and in a few instances to statements made by appellee's counsel during the course of the trial. Without conceding that the remarks in question exceeded the bounds of propriety, we believe that Hobart cannot resort to them on appeal due to his failure to take timely objections to any of the statements at the trial. See Louisiana & Arkansas Ry. Co. v. Johnson, 214 F. 2d 290 (5 Cir. 1954), cert. denied 348 U. S. 875 (1954). In the absence of such objections the remarks of appellee's counsel are not available to him as grounds for reversal. Furthermore, it should be stated herein that during the trial the judge on his own initiative was quick to instruct the jury on occasion to disregard certain remarks for both sides."

It is respectfully submitted that said opinion does not take into consideration the terrifically damaging influence upon the jury of the continued references by Mr.

Prendergast about Mr. Mahony and the tieing in of such references with the statement about Mr. Mahony in the closing argument, all as set forth hereinabove. It is respectfully submitted that it is most improper for a lawyer to make comments regarding the trustworthiness of opposing counsel as a trial proceeds and then in the closing argument to infer that opposing counsel is not "fair and square" and state that he "twists the facts again".

The United States Court of Appeals for the First Circuit, while not conceding that the remarks in question exceeded the bounds of propriety, took the position that Dr. Hobart could not resort to them on appeal due to failure of his counsel to have taken timely objection to any of these statements at trial.

The record, as quoted from pages 99 and 100 of the Consolidated Record Appendix hereinbefore shows that Mr. Mahony did object the first time that Mr. Prendergast made a reference to Mr. Mahony not telling the truth. It is true that there was no objection taken to Mr. Prendergast's statement regarding "sneaking in words" as pointed out hereinabove from page 201 of the Consolidated Record Appendix. Nor was any objection made to Mr. Prendergast's remark to the effect that Mr. Malony was in this case "up to his neck" as set forth in excerpt hereinabove from page 275 of the Consolidated Record Appendix. As the record shows, counsel for Dr. Hobart did not interrupt Mr. Prendergast at any time during Mr. Prendergast's argument. The point with regard to these improper remarks during the trial and statements during the course of Mr. Prendergast's argument is that same were tied in with each other to cast such a shadow upon counsel for Dr. Hobart as to have precluded Dr. Hobart, as the litigant, from substantial justice in this case. It is respectfully submitted that the United States Court of Appeals for the

First Circuit is in error in disregarding the point on the ground that counsel for Dr. Hobart failed to make timely objection. It is not the effect of any *one* such comment or statement which was pointed out to the United States Court of Appeals for the First Circuit and is again pointed out here. It is the effect upon the jury of all of these comments and statements which add up to a prejudice against Dr. Hobart as a litigant.

The United States Court of Appeals for the First Circuit also took the position that the trial Judge on his own initiative was quick to instruct the jury on occasion to disregard certain remarks of counsel for both sides. Present counsel for Dr. Hobart has searched the record and has found no instance whatsoever in which counsel for Dr. Hobart made any comment regarding counsel for Mr. O'Brien which would have tended to have caused the jury to have a lesser regard for the trustworthiness of counsel for Mr. O'Brien. It is true, as shown on page 100 of the Consolidated Record Appendix, that after Mr. Mahony objected to Mr. Prendergast having said that Mr. Mahony "won't tell us the truth" that the trial judge said "alright, counsel doesn't mean anything by that". It is also true, as is set forth on page 275 of the Consolidated Record Appendix, that after Mr. Prendergast had said that Mr. Mahony was in this case "up to his neck" the trial judge said "you must disregard comments. They are made in a spirit of fun. We want to judge the case on the testimony".

The opinion of the United States Court of Appeals for the First Circuit is to the effect that a condition precedent for a reversal on grounds of impropriety of counsel is that objection must be made to comments made by counsel while evidence is being introduced and objection must be made to statements in the closing arguments. The opinion of the United States Court of Appeals for the First Circuit indicates that where a trial judge in

some instances makes corrections and tells a jury either to disregard a certain comment or that another comment was made in a spirit of fun that such remarks by a trial judge will overcome the prejudices which can be built up within jurors against a litigant when the trustworthiness of litigant's attorney is challenged by comments during the introduction of evidence and by statements in the closing argument which are tied in, by the nature of same, to the earlier comments.

It is respectfully submitted that the law is as set forth, both in the Brief in Support of Motion in the court below and the Brief submitted to the United States Court of Appeals for the First Circuit, the same being found on page 273 of 64 Corpus Juris under the heading "Trial", the subheading "Propriety of Particular References, Comments and Arguments" and the Sub-subheading "Comments on Credibility or Conduct of Parties, Attorneys or Witnesses—In General," as follows:

> "Where his remarks are not sustained by the facts it is improper for counsel in argument to make statements reflecting upon the character or conduct of the opposite party or his attorney . . ."

In addition to the foregoing, American Jurisprudence brings in the element of whether or not the misconduct of counsel was detrimental to his opponent in the following quotations as set forth in 3 American Jurisprudence pages 607 and 608 in Section 1059 under the Heading "Appeal and Error", Subheading Misconduct of Counsel," Sub-subheading, "Trial Generally", as follows:

> "As a general rule, a judgment will not be reversed for misconduct of counsel, unless the appellate court is of the opinion that such misconduct had a prevailing influence upon the jury to the detriment of the appellant."

Under an entirely different title, namely, 53 American Jurisprudence page 410, in Section 507 under the heading,

"Trial", the Subheading, "Argument and Conduct of Counsel" and the Sub-subheading "Admonition of Counsel", the law is set forth with reference to the unrestrained misconduct of counsel, as follows:

> "The trial court should not only sustain objections to improper conduct and argument of counsel and charge the jury to disregard it, but should rebuke and reprimand offending counsel as well, in order to stop its repetition."

The latter two quotations were included in the Brief in Support of the Motions in the United States District Court for the District of Massachusetts but were not included in the Brief in the United States Court of Appeals for the First Circuit.

Counsel for this petitioner has studied the case of Louisiana and Arkansas Ry Co. v. Johnson, 214 F 2d. 290 (5 Cir. 1954), cert. denied 348 U. S. 875 (1954) cited on page 11 of the Opinion of the United States Court of Appeals For The First Circuit and can come to only one conclusion, namely, that the remarks made by counsel in the case of Louisiana and Arkansas Ry Co. v. Johnson, supra, did not compare in seriousness with the cutting derogatory comments and statements regarding counsel for Dr. Hobart, as pointed out hereinabove. The opinion of the Court of Appeals in said case deals, primarily, with prejudicial remarks of the Trial Judge.

Point Re: Argument of Counsel which was outside of the scope of the Evidence.

It is pointed out both in the Brief in Support of the Motions filed subsequent to trial in the United States District Court for the District of Massachusetts and in one of the Briefs in behalf of Dr. Hobart in the United States Court of Appeals for the First Circuit that Mr. Prendergast, in his closing argument, made a reference to the words allegedly spoken by the witness John H.

Robinson which, though they may possibly have been spoken at some other time, were not spoken as evidence in the trial of this case. The specific words are set forth hereinabove from the argument of Mr. Prendergast as found on page 518 of the Consolidated Record Appendix and are repeated to avoid a cross-reference:

> "I asked him for all the information he could give me which would either help or hurt, and we got talking and I tried to get him to get the records and when I tried to talk about pictures, I tried to get those and then finally in disgust he says if the doctor was over on his own side of the road, this accident wouldn't have happened."

The testimony of the witness Robinson as pointed out hereinaboye under the heading Statement of the Matter Involved, as taken from page 375 of the Consolidated Record Appendix, most certainly did not justify any such statement as was made by Mr. Prendergast. The United States Court of Appeals for the First Circuit did not specifically pass upon this point. Should this Honorable Court fail to grant the writ of mandamus and order a new trial we would have a situation in which counsel had spoken words which were purported to be the words of a witness and which, if ever spoken, were not introduced in evidence at the trial of the case. Never in the history of Anglo-American jurisprudence has there ever been a more shocking miscarriage of justice than is the case which is the subject of this petition. No point is more shocking than the use in argument of a terribly damaging punchline, as attributed by Mr. Prendergast to the witness Robinson, which in fact was not spoken at the trial of this case by the witness Robinson. The law with regard to this situation is basic. It is set forth as follows, from 64 C. J. Page 276, under the heading "Trial", the subheading, "Right to Counsel; Argument and Conduct of Counsel", sub-heading "Propriety of Particular

References, Comments and Arguments" and paragraph heading "Appeals to passion or Prejudice, in General:

> "Arguments and comments by counsel calculated to arouse the passions and prejudices of a jury by presenting to them considerations extraneous to the evidence are highly improper".

POINT RE: ARGUMENT OF COUNSEL INTENDED TO INCITE THE SYMPATHIES AND PREJUDICES OF THE JURORS.

References are made in the "Statement of the Matter Involved" hereinabove to excerpts from the argument of Robert H. Daily, Esquire, as found on page 500 of the Consolidated Record Appendix and from the argument of Michael Prendergast, Esquire, as set forth on page 513, again on pages 513 and 514, and a third excerpt from page 515. It is believed and therefore respectfully submitted that the same quotation of law set forth hereinabove supports the contention that such statements were improper. Said statements were obviously calculated to arouse the passions and prejudices of the jury against Doctor Hobart by arguing matters extraneous to the evidence, and, when tied in with other points hereinabove, support the basis for a reversal and a new trial in this case.

POINT RE: VERDICT OF JURY HAVING BEEN CONTRARY TO THE EVIDENCE AND TO THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

In consideration of the fact that this Honorable Court will only grant the writ of certiorari where there are special and important reasons for doing so, it is realized that the fact that a jury has returned a verdict which is contrary to the evidence, standing alone, would not, generally, be the basis for this Honorable Court to grant a writ of certiorari. However, where, as in this case, there has been a gross miscarriage of justice, including

not only the discrepancies in the trial as pointed out hereinabove but also a verdict which was contrary to the evidence and the weight of the evidence adduced at trial, the sum total is such as to make out special and important reasons why the writ should be granted, and this Honorable Court review this cause and grant a reversal. A full and complete understanding of testimony with regard to the collision can only be obtained by reading the entire transcript of the testimony of the eyewitnesses to the collision and of the police officers who investigated the collision, all as referred to hereinabove. However, the crux of the testimony of the eyewitnesses is as set forth in the following excerpts:

From the testimony of Dr. Harold M. Holart as set forth on pages 439 and 440 of the Consolidated Record Appendix:

> "Q. Now, from that point on will you describe anything which you observed as to the course of the truck?"
>
> "A. When he approached me he was—when he got within about four or five carlengths the truck left the lane and came toward me at an angle, came over into my lane, I would judge about half the width of the truck, and the driver's side, the left side of the truck struck the left side of the car I was driving."
>
> "Q. Now, at the point of when you first saw him come over, as you have testified, into your lane, what, if anything, did you do in the operation of your car? A. I applied my brakes. I was unable to turn into the right lane because of the obstruction there, some piles of dirt, and we immediately made contact with the truck."
>
> "Q. I think you stated when you first saw the truck start over into your lane it was, according to your best memory, four or five carlengths away? A. I would judge that."
>
> "Q. What is your best estimate as to your own speed at the time you first saw the truck start into your lane? A. I would judge about 30 miles an hour."

"Q. What is your best estimate as to the speed of the truck at that point?' A.' Between 40 and 50 miles an hour."

"Q. Now, what is your best estimate of the speed of your car at the moment of the contact between your car and the truck? A. I believe it was pratically stopped.

"Mr. Prendergast: May that go out, your Honor?

"Mr. Buzzell: I think it is responsive, if your Honor please.

"Mr. Prendergast: He was asked the speed at the time of the accident.

"The Court: It was not responsive to the question, Mr. Buzzell. I will order it striken.

"Mr. Buzzell: He wasn't moving.

"Mr. Prendergast: He says he was practically stopped.

"Mr. Buzzell: All right, let's have it more specific.

"Q. How fast, if at all, do you think you were moving?

"Mr. Prendergast: I pray your Honor's judgment. Not how fast if at all. He has already said he was practically stopped. That means movement.

"Mr. Buzzell: I want to find out what it does mean.

"Mr. Prendergast: All right.

"Mr. Buzzell: Let the witness say.

"The Court: All right. (To witness) How fast were you going?

"The Witness: Five miles an hour."

From the testimony of Mrs. Irma Belk Hobart as set forth on page 480 of the Consolidated Record Appendix:

"Q. Now will you describe for the jury the subsequent course of travel, as you observed it, and what happened from that point on? A. The truck continued in an easterly direction, with its wheels still over the white line, and continued to come more in the center lane than it had been when I first saw it."

From the testimony of Mr. Robert Whitney as set forth on page 396 of the Consolidated Record Appendix:

"Q. When you say you saw the truck, going back

over it again—when you first saw the truck, where was it? A. He was traveling with two wheels in the center lane and two wheels in his right lane."

"Q. What two wheels were in the center lane? A. His left wheels."

"Mr. Prendergast: All right.

"Q. What did you see after that? A. I see him come on and hit the Chrysler.

"Q. Where was the Chrysler when he hit him? A. Just his front wheels, about at the construction holes before the Acton line."

"Q. In what part of the road was the Chrysler traveling? A. On the right side of the center lane, right up next to the construction."

From the testimony of Mrs. Lillian Whitney as set forth on page 430 of the Consolidated Record Appendix:

"Q. Tell us what you saw. A. He kept on coming more over the white line into the middle lane."

"Q. Go on and tell just what you saw. A. And when he was about straddling the white lane, the white line, he came in contact with the Hobart car."

"Q. And how much of his truck was in the middle lane at the time of the contact between the truck and the Hobart car? A. I would say just about half of it".

From the testimony of Mr. Joseph Mullaney (the passenger in the cab of the truck driven by Mr. O'Brien) as set forth on page 203 of the Consolidated Record Appendix:

"Q. Did you see this accident happen? A. No.

"Q. Were your eyes open at the time the accident happened? A. Partly.

"Q. Where were you looking? A. Out the window."

"Q. Which window? A. The right window."

"Q. All right. Did you see any of these cars? Withdraw that. Did your see the cars or any cars coming in the opposite direction just before the accident happened? (246) A. No."

"Q. You were still looking out the window? A.

I didn't notice them. I didn't pay no particular attention.

"Q. All right. You say at the time the accident happened you were looking out the right window? A. That's right.

"Q. Did you see out the right window as you were looking? A. Fields.

"Q. What else? A. Guard rail.

"Q. Did you see the guard rail? A. Yes.

"Q. Tell the Court and Jury what you mean by that. A. That's the fence along the side of the road.

"Q. Was there a cement post and then wires and then another cement post and then wires. A. Yes, cement posts.

"Q. Can you tell the Court and Jury approximately how far that cement—those posts and guard rails were from the right side of the truck at or just before the accident happened? A. About 6 feet."

The heart of the testimony of the Police Officers which verifies the contention that the verdict was contrary to the evidence is as follows:

From the testimony of Officer Americo J. Sousa as set forth on page 307 of the Consolidated Record Appendix:

"Q. Then the fence. Now so far as the truck is concerned what did you observe about that? A. The truck was facing in a northerly direction with the front end up against the State fence, and I observed that the right front wheel of the truck had leading from it some tire marks on the road, which led from the right front tire 90 feet into the eastbound lane, approximately 2 feet over the solid white line.

"Q. Over the what? A. Over the line."

Mr. Daley: If that is offered as any indication as to a line put there under authority of the State to mark off the road, I object, because of the evidence we have."

Mr. Prendergast: Unless it is legally established in accordance with law, that it was there in accordance with law."

"Q. This mark you have been referring to—

"The Court: Let me have the question and answer.

(The question and answer are read.)

"Mr. Mahony: This mark, I think the officer has been referring to, is a mark, a wheel mark."

"(409) Q. Is it not? A. It's the back tire mark left on the Macadam surface of the road by the right front wheel of the tractor truck."

"Q. That you say went 90 feet back toward the west? A. And that went 90 feet back towards the westerly direction."

"Q. From the most westerly point where it began, how close was that mark where it began to the right side or the most southerly side of the traveled part of the road? A. Approximately 8 feet."

"Q. Where it ended you say was at the right front wheel of the truck—it was up against the fence? A. Yes."

From the testimony of Sergeant Daniel F. Driscoll as set forth on page 354 of the Consolidated Record Appendix:

"Q. Sergeant, the mark which you referred to and testified to as leading to the right front wheel of the truck, that wheel wasn't a dual wheel but a single wheel? A. That is correct.

Sergeant Driscoll's testimony referred to Plaintiff's Exhibit Number 9 which constitutes page 613 of Volume II of the Consolidated Record Appendix. The significience of the testimony is that Sergeant Driscoll identified the tire mark as having led up to the right front wheel of the truck driven by Mr. O'Brien.

The opinion of the United States Court of Appeals for The First Circuit, in summing up the testimony, on pages 3, 4 and 5 of said opinion, made much of the fact that Dr. Hobart when called as a witness by his opponent became confused and stated, as set forth on page 273 of the Consolidated Record Appendix, that the right front bumper of the truck driven by Mr. O'Brien hit the left front bumper and wheel of the automobile driven by Dr. Hobart; that Mr. O'Brien testified that he was on the

right side of the road and that Dr. Hobart's automobile "came toward him, hitting the left front side of his truck", and that Mr. Whitiney testified "that the Hobart automobile turned to the left immediately prior to the accident, and the collision occured as it was turning".

Dr. Hobart corrected the testimony given earlier in the trial, and testified, as set forth in the excerpt from page 439 hereinabove, that the left side of the truck hit the left side of his automobile.

Mr. O'Brien's story about the collision in question, as given at the trial of this case in the United States District Court for the District of Massachusetts, as set forth on pages 58 through 62 of the Consolidated Record Appendix is completely unworthy of belief. The most incredible part of his testimony is the following excerpt from pages 61 and 62 of the Consolidated Record Appendix:

> "Q. Did that car and your truck come in contact? A. Yes."
>
> "Did you see the car and your truck come in contact? A. Yes."
>
> "Q. What part of the car came in contact with your truck? A. The left front."
>
> "Q. What part of your truck came in contact with the automobile? A. Left front wheel at the rear."
>
> "Q. The rear of the left front wheel? A. That's right."

The vast preponderance of the testimony, as pointed out hereinabove, was that the left side of the truck driven by Mr. O'Brien was well over to the left edge of the lane in which he should have been driving.

Defendant's Exhibit E-11 or the blown up version of same, which is plaintiff's Exhibit Number 8, best depicts the lane in which the truck driven by Mr. O'Brien should have been traveling just before and at the time of this accident. The skid marks show how far his truck was

from the right edge of the roadway. His own helper, Mr. Mullaney, as shown hereinabove, estimated that the right side of the truck was 6 feet from the guard rail along the southernmost edge of the road. Officer Sousa, as pointed out hereinabove, testified that the skid mark from the right front wheel of Mr. O'Brien's truck was "approximately 8 feet" from the right side or most southerly side of the road. When one adds the width of the truck driven by Mr. O'Brien (and he said it was 8½ feet wide, page 57 of the Consolidated Record Appendix) to the distance from the right front wheel to the southernmost edge of the road the conclusion is inescapable that this accident must have occurred by reason of the left side of the truck driven by Mr. O'Brien having been well over to the left of the line which defined the left side of the lane in which he should have been traveling. *However, even without the foregoing, Mr. O'Brien's story to the effect that Dr. Hobart's vehicle ran into the rear of the left front wheel of the truck that he was driving was obviously erroneous when one looks at Exhibit E-12, page 493, Volume II of the Consolidated Record Appendix and notes that the running board and cab door just in back of said left front wheel remained through said accident without blemish and so appeared after the accident.*

It is true that the witness Whitney under pressure of cross examination gave the following testimony which was referred to on pages 4 and 5 of the opinion of the United States Court of Appeals for the First Circuit "that the Hobart automobile turned to the left immediately prior to the accident, and that the collision occurred as it was turning". Said testimony as found on pages 401 and 402 of the Condensed Record Appendix is as follows:

> "(551) X-Q. Did you ever see the Hobart car do anything other than head in the direction of Acton, from the time you saw the truck up until the accident happened? A. No, sir.

"X-Q. Did you ever see the Hobart car turn to the left at any time from the time you first saw the truck, up until the accident happened? A. He might have turned away."

"X-Q. Not what he might have done, Mr. Whitney. The question is very simple, did you ever see the Hobart car turn to its left at any time between the time you first saw the truck and up until the accident happened? A. Slightly, maybe."

"Mr. Prendergast: I didn't ask you whether it was slight or not. May that go out, Your Honor?"

"The Court: 'Slightly', 'maybe' yes, it may".

"X-Q. You have no interest in this case, have you? A. No, sir."

"X-Q. You are not prejudiced against the truck driver, are you? A. No, sir."

"X-Q. Let me ask again, at any time from the time you first saw the truck up and until this accident happened, did you ever see Dr. Hobart's car turn to the left? A. Yes, sir."

"X-Q. You told the police that didn't you? (552) A. Yes, sir".

"X-Q. And when he turned to the left, the accident happened, didn't it? A. Yes, sir."

"X-Q. And you were within 50 feet of this accident when you saw that happening. That is so, isn't it? A. Yes, sir."

It is also true, however, that in addition to the above referred to testimony on direct examination by the witness Robert Whitney, on cross examination he *again* placed the truck driven by Mr. O'Brien well over to the left of the lane in which said truck should have been traveling. This testimony is as found on pages 399-400.

"X-Q. About what speed was the car in front of you traveling at? A. I would say, about the same."

"X-Q. You were both in the center lane, were you? A. Yes, sir".

"X-Q. Now at some time while you were operating in the center lane, do you see a truck coming in the opposite direction? Is that correct? A. Yes, sir."

"X-Q. At that time you say that the truck's left wheels were also in the center lane, is that correct? A. Yes, sir."

"X-Q. In other words, the first time you saw the truck, its left wheels were in the center lane, is that right? A. Yes, sir."

"X-Q. How far in the center lane were the left front wheels of the truck? A. I would say almost straddling it completely."

"X-Q. How far now in footage? A. I cannot say."

"X-Q. Did you ever say 2 or 3 feet? A. Yes, I might have approximated that."

"X-Q. Did you at some time under some different circumstances (549) and while under oath, say this: that the truck's left wheels were in the center lane a distance of 2 to 3 feet? A. I probably approximated that, sir."

"X-Q. If that was so, was that the truth at that time? A. Yes, sir."

"X-Q. It would likewise be the truth today? A. Yes, sir."

"X-Q. It it fair now, without any qualifications at all, your first memory is, the left wheels of the truck were on the center lane, 2 to 3 feet? A. Yes, sir."

It is most respectfully submitted that the testimony of Mr. Whitney could not possibly constitute sufficient corroboration to sustain any contention other than that by the vast preponderance of the oral evidence and the physical facts this accident was caused by the truck driven by Mr. O'Brien being well over to the left of the lane in which it should have been traveling. Even if some credence should be given to Mr. O'Brien's story and the alleged corroboration of Mr. Whitney, the verdict of the jury in the United States District Court for the District of Massachusetts most certainly was contrary to the law regarding contributory negligence. It is respectfully submitted that Mr. O'Brien's story, as allegedly so corroborated is, in view of the evidence pointed out hereinabove, totally unworthy of belief. It is the

position of counsel for Dr. Hobart that the negligence of Mr. O'Brien and only that of Mr. O'Brien caused this collision. As a matter of law however, it is basic that even though the position of counsel for Dr. Hobart did not stand up in the motions filed in the United States District Court for the District of Massachusetts or in the United States Circuit Court for the First Circuit or should not stand up in this Honorable Court, yet, the very necessity of Mr. O'Brien's contributory negligence, from all of the evidence and more particularly from that pointed out above, should have caused the motion for a new trial to have been granted by the trial judge or a reversal in the United States Court of Appeals for the First Circuit or, taken with the other discrepancies of this trial as pointed out hereinabove, should form the basis for a reversal by this Honorable Court.

The position taken by the Justices of the United States Court of Appeals for the First Circuit, with regard to petitioner's contention that the verdict was contrary to the evidence, is summed up on pages 9 and 10 and the top of page 11 of the opinion of said Court. The opinion of said Court appears to counsel for petitioner to be that since whenever the evidence is such that fair minded men may draw inferences therefrom and reasonably disagree as to what the verdict should be the matter is for the jury, the same being taken from quotations from the case of American Fiduciary and Casualty Company vs. Dexter, 220 F. 2d 930, 932, 933 (5 Cir. 1955) is set forth on page 9 of said opinion. The position of the United States Court of Appeals for the First Circuit also appears to be that once a case has become the subject of a finding by a jury and the jury has rendered a verdict, the Trial Court should not, nor should a Court of Appeals reverse such finding unless there is an abuse of discretion on the part of the Trial Court in failing to grant a new trial the same being supported, according to said opinion, by

the case of Thiringer vs. Barlow, 205 F 2d. 476, 478 (10 Cir. 1953). The position taken by the Court of Appeals appears to counsel for petitioner to be that from the summary of the testimony of the eyewitnesses and the conflict in the evidence there was a question for the jury, that Dr. Hobart's confusion in describing the collision may have worked against him in the minds of the jury, and that the jury could have found from the evidence that Mr. O'Brien at all times remained on the right side of the road and that the collision was caused by Dr. Hobart's turning to the left. The United States Court of Appeals for the First Circuit takes the position that the pictures of tire marks and position of the vehicles after the accident did not constitute physical facts which flatly contradict and therefore nullify the oral testimony. Counsel for petitioner most thoroughly and heartily agrees with the fact that the pictures do not nullify oral testimony but that, to the contrary, the pictures submitted in evidence, as referred to hereinabove, support the testimony of the eyewitnesses to the effect that the truck driven by Mr. O'Brien was well over to the left of the line which defined the left edge of the lane in which it should have been traveling. This testimony of the eyewitnesses constitute the vast preponderence of the evidence and is supported by the pictures, including that picture referred to herein above, which shows not a splinter off of the running board in back of the left front wheel of the truck driven by Mr. O'Brien and not a dent in the left door of the cab of said truck. This evidence of the eyewitnesses as to how the accident really happened, supported as it was by the pictures, constitutes, it is respectfully submitted, such a vast preponderance of the evidence, when compared with Mr. O'Brien's story and the fallacy in connection therewith, as to meet the test as set forth in the excerpt from American Fiduciary and Casualty Company, supra, and show that fair minded men could not draw inferences

therefrom; and also to meet the test set forth at the bottom of page 10 and the top of page 11 with regard to abuse of discretion. It is respectfully submitted to this Honorable Court that the failure of the Trial Judge in the United States District Court for the District of Massachusetts to grant a new trial did constitute an abuse of discretion and that it was error for the United States Court of Appeals for the First Circuit to take the position that there was no abuse of discretion in the denying of the motion for a new trial in the Court below:

"It is true that the case of Lavender v. Kurn, 327 US 645, 658, 665 S. Ct. 740, 744, 90 L. Ed. 916 supports the excerpt from the case of American Fidelity and Casualty Co. v. Drexler, supra, quoted on pages 9 and 10 of the opinion of the United States Court of Appeals for The First Circuit. However, the question in both Lavender v. Kurn and American Fidelity and Casualty Co. v. Drexler was whether or not there was some evidentiary basis for the jury's decision. There was in both of said cases. It is respectfully submitted that there was no evidentiary basis for the jury's decision in this case, but even more certainly that there could have been no possible evidentiary basis for the verdict holding Dr. Hobart to have been totally liable for the collision, upon the basis of negligence, and that allowing the judgment for Mr. O'Brien to stand unreversed violates the basic law regarding "contributory negligence" as set forth in 38 American Jurisprudence under the title "Negligence", the sub-heading "Contributory Negligence, the sub-sub-heading "In General and the paragraph "Generally"; defense at Common Law"; on pages 848, 849 and 850."

"No one can charge another in damages for negligently injuring him where his own failure to exercise due and reasonable care was responsible for the occurrence of the injury. Although it may be shown that the defendant did not exercise care, yet no recovery will be allowed

against him if it further appears that the injury would have been avoided if the person injured had exercised care on his part."

As this case now stands, even if negligence should be imputed by Dr. Hebart by the ridiculous story of Mr. O'Brien supported only by the corroboration of Mr. Whitney, heretofore commented upon, Mr. O'Brien should surely not be allowed this tremendous recovery in the light of Mr. O'Brien's negligence as proven by the vast preponderance of the verbal evidence and as supplemented by the physical facts brought out in the evidence.

Weight is added to the foregoing contention of counsel for this petitioner by the following quotation from Babbitt on "Motor Vehicle Law", Fourth Edition, as found in Chapter XXXVIII heading "Automobile Negligence", Section III "Contributory Negligence", Paragraph 1377, In General", pages 975 and 976 which is as follows:

> "and plaintiff's disregard of statute, if contributing to his injury, precludes recovery."

The case of Cannon v. Bassett 264 Massachusetts Reports, 162 N. E. 772 is cited in support of the foregoing in the footnotes. The following is an excerpt from page 386 of said case

> "The jury was fully and correctly instructed that disregard of the statute was evidence of negligence, and if the plaintiff's disregard contributed to the accident that no recovery was possible: * * *".

Continuing on the same paragraph from Babbitt on "Motor Vehicle Law" as quoted above, on page 976 we find the following:

> "Upon this general principle of law a plaintiff whose conduct proximately contributed to or caused his injuries, is precluded of his right of recovery, under the following situations * * * where he failed to keep to the right * * *."

The footnotes in support of said quotation cite the case of Maritzky v. Chadwick Hayes Co., 12 La. App. 104, 124 Southern 566. In that case the Court on page 568 (124 Southern) used the following language:

> "Counsel for defendant urge the point that, if it be held that driver of plaintiff's car was negligent, then it follows that defendant should recover for the damage done to its truck. That does not necessarily follow. Defendant's driver was also negligent. When he passed over the bridge, he saw or could have seen if he had looked, the automobile approaching from the opposite direction. It was then his duty to swerve his truck over to the right hand side of the road as far as he could with safety. Instead of doing that, he proceeded straight down the road until he met the automobile, at which time the extreme left hand portion of his truck was at least 2 feet beyond the center of the road. There is no reason suggested why he should not have gotten entirely over on his side of the road. The fact that he did not do so is due to his own fault and negligence. *It is perfectly clear that the truck driver's negligence in getting across the center of the road contributed to the collision. We think that even though Mrs. Maritzky was negligent, defendant's contributory negligence was such as to bar its recovery.*" (Emphasis added).

Although the analogy between the case which is the subject of this petition and Maritzky v. Chadwick Hayes Co., supra, is not an exact one, by reason of the fact that, by the preponderance of the evidence, supported by the physical facts as pointed out hereinabove, and by reason of the unworthiness of belief of Mr. O'Brien's story as contradicted by the preponderance of the evidence and the physical facts, Dr. Hobart was not guilty of any negligence, yet, even if he had been, Mr. O'Brien, under the rule as to driving on the wrong side of the road as set forth hereinabove, should have been and should now by this Honorable Court be precluded from enforcing the judgment against Dr. Hobart.

Although Mr. O'Brien's conviction for "Failing to keep to the right when view is obstructed", as shown on page 562 (Volume II) of the Consolidated Record Appendix, could not be brought out in evidence in the trial of the case, upon which this petition is based, in the United States District Court For The District of Massachusetts, same was known to the United States Court of Appeals For The First Circuit by inclusion thereof in said Consolidated Record Appendix. It is respectfully submitted that such conviction adds tremendous weight to the foregoing argument regarding the negligence and/or contributory negligence attributable to Mr. O'Brien which should preclude the enforcement of the judgment and justify a reversal by this Honorable Court.

It is respectfully submitted that a careful review of the case of Merchants Motor Freight v. Downing, 227 F (2d) 247 (8 Cir 1955) as referred to on page 10 of the opinion of the United States Court of Appeals for the First Circuit does not disclose any principle of law which is contrary to the above referred to basic principles. That case turned on a failure of the Trial Judge to have instructed the jury on the question of "care required in an emergency" and the verdict in favor of the defendant on his counter claim was reversed and the case remanded to the District Court for a new trial.

In view of the review of the evidence, as set forth hereinabove, counsel for this petitioner takes the position that the evidence offered by Mr. O'Brien was so unworthy of belief that there was no issue for the jury and that the finding to the effect that Mr. O'Brien was not even contributorily negligent renders this case as a most gross miscarriage of justice which should have been corrected by a reversal based upon the motions in the United States District Court For the District of Massachusetts or by the United States Court of Appeals For The First Circuit.

It is true that the principle is established by the case of Thiringer v. Barlow 205 F. 2d 476 (10 Cir., 1953), as referred to on pages 10 and 11 of the Opinion of the United States Court of Appeals For The First Circuit, that (as found on page 478):

> "A motion for new trial is addressed to the sound judicial discretion of the trial court and the action taken thereon is not open to review on appeal unless it appears that there was an abuse of discretion."

The United States Court of Appeals for the First Circuit held that there was no abuse of discretion on the part of the Trial Judge in the United States District Court For The District of Massachusetts in denying the Motions filed in said Court subsequent to the verdict of the jury against Dr. Hobart in the sum of $61,000.00. This Honorable Court is respectfully requested to issue the Writ of Certiorari and to determine that there was an "abuse of discretion" in the failure of the Court below to grant the Motion for a New Trial and that the Court of Appeals erred in not recognizing such abuse of discretion and ordering a New Trial.

SUMMATION OF ARGUMENT

The strong points in behalf of the petitioner Dr. Hobart as brought out hereinabove, even at the expense of repetition, are that at the trial counsel for Mr. O'Brien belittled the trustworthiness of Thomas H. Mahony, Esquire, and then pinched home to the jury, in his closing argument, a contention to the effect that Mr. Mahony was not trying to be "fair and square" and that Mr. Mahony had "twisted the facts"; that counsel for Mr. O'Brien misquoted, in his closing argument, a statement allegedly made in evidence (but not in fact made) by the witness John H. Robinson; and that the evidence adduced at the trial so clearly showed that the collision in question was caused by the negligence of Mr. O'Brien, by being on the wrong

side of the road, and his own story as to how the accident happened was so completely fantastic that this case resulted in such a gross miscarriage of justice as is shocking. Any one of the foregoing points, or even the point regarding the appeal by counsel for Mr. O'Brien to the prejudices of the jury could well be considered the "special and important reasons" why this Honorable Court should grant the Writ of Certiorari and, upon a hearing order a new trial. The composite whole of the points made hereinabove, point to only one result, namely, that a Washington doctor is the victim of chicanery practiced in the United States District Court for the District of Massachusetts and that our entire judicial system is in danger of ridicule, unless this Honorable Court will take jurisdiction of this case and grant relief.

Respectfully submitted,

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APPENDIX

"FAILING TO KEEP TO THE RIGHT WHEN VIEW IS OBSTRUCTED": CHAPTER 89 SECTION 4 OF THE ANNOTATED LAWS OF MASSACHUSETTS.

"VEHICLES TO KEEP TO RIGHT WHEN VIEW OBSTRUCTED; EXCEPTIONS; Whenever on any way public or private, there is not an unobstructed view of the road for at least 400 feet, the driver of every vehicle shall keep his vehicle on the right of the middle of the traveled part of the way, whenever it is safe and practicable so to do, except that the Department of Public Works may alter this provision by the use of restrictive pavement markings in areas of limited sight distance, at intersections and at obstructions in the highway on state highways, on ways leading thereto and on all main highways between cities and towns; provided, that such markings shall be in accordance with accepted standards of engineering practice but, notwithstanding the foregoing provision every driver of a slow moving vehicle, while ascending a grade shall reasonably keep said vehicle in the extreme right-hand lane until the top of such grade has been reached".

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 5172

HAROLD HOBART, Defendant, Appellant,

v.

MICHAEL P. O'BRIEN, Plaintiff, Appellee;

No. 5173

HAROLD M. HOBART, Plaintiff, Appellant,

v.

JOHN G. DONOVAN ET AL., Defendants, Appellees.

Appeals from the United States District Court
for the District of Massachusetts

Before WOODBURY and HARTIGAN, *Circuit Judges*, and FORD, *District Judge*.

Thomas H. Mahony, with whom *Joseph G. Bryer* was on brief, for Harold Hobart, appellant in No. 5172.

Michael Prendergast, with whom *Reuben Nitkin* was on brief, for Michael P. O'Brien, appellee in No. 5172.

Philip B. Buzzell, with whom *Charles M. Ewing* and *Hemenway & Barnes* were on brief, for Harold Hobart, appellant in No. 5173.

Philander S. Ratzkoff, with whom *Robert N. Daley* and *Parker, Coulter, Daley & White* were on brief, for John G. Donovan et al., appellees in No. 5173.

OPINION OF THE COURT.

April 22, 1957.

HARTIGAN, *Circuit Judge*. These appeals are from final judgments based upon jury verdicts in personal injury actions, entered in the United States District Court for the District of Massachusetts on December 13, 1955, one (No. 5172) ordering that plaintiff-appellee, Michael P. O'Brien, recover of the defendant-appellant, Harold M. Hobart, in the sum of $61,000 with interest thereon from June 26, 1952 totalling $12,677.83, and the other (No. 5173) denying the claim for recovery of plaintiff-appellant, Harold M. Hobart against defendants-appellees John G. Donovan and Michael P. O'Brien. Subsequent to judgment a remittitur of $13,000 was made by appellee O'Brien in accordance with an order of the court.

The litigation arose out of a collision of a tank truck owned by appellee John G. Donovan, d.b.a. the Utility Oil Co., and driven by his employee, appellee O'Brien, and an automobile owned by Irma B. Hobart and driven by her husband, appellant Hobart, on Route 2 in Concord, Massachusetts, on June 21, 1952. Jurisdiction was based upon diversity of citizenship.

By a complaint filed June 26, 1952 appellee O'Brien alleged that appellant Hobart negligently drove a motor vehicle so that it collided with the motor vehicle being operated by O'Brien. In a complaint filed May 8, 1953 appellant Hobart alleged that appellee Donovan and his employee, appellee O'Brien, negligently drove a motor vehicle on the aforementioned public highway against Hobart who was then driving on said highway. The two actions were consolidated for trial.

In seeking reversal of the judgment entered for appellee O'Brien, Hobart, as defendant appellant, asserts that the trial court erred in refusing to grant (1) his motion for summary judgment; (2) his motion for directed ver-

dict and (3) his motion for judgment n.o.v. or a new trial. In addition, Hobart assigns as error certain rulings of the trial court on evidence, excessive damages and the allowance of interest from the date of the writ.

In seeking reversal of the judgment denying his claim for recovery, Hobart, as plaintiff-appellant, asserts that the trial court erred in refusing to grant his motion for new trial and assigns as error certain rulings of the trial court on evidence. Since the two appeals to some extent turn on similar issues, we shall treat them both in this opinion.

The record shows that in the early afternoon of June 21, 1952 Hobart was traveling west on a section of Route 2 that was comprised of three lanes. As he approached the town line between Concord and Acton, approximately one quarter of a mile east of the scene of the accident, he observed indications of construction going on and found the northern lane obstructed by warning signs, dirt, materials and equipment. By reason of these obstructions he went into the middle lane. Traveling behind him some fifty feet was an automobile driven by Robert Whitney, a witness at the trial.

O'Brien, driving a tank truck in the course of his duty as an employee of Donovan, was traveling east in the southern lane of this highway. As Hobart and O'Brien approached and went to pass each other their vehicles collided. The truck and automobile, as a result of the collision, ended up against a guard rail on the northern lane, Hobart's car facing south and the truck facing northeast.

Hobart, in describing the accident, testified that he was traveling 25-30 miles an hour, that he at all times remained in the center lane and that when the O'Brien truck was four or five car lengths away, it left the southern lane and came into the center lane at an angle, colliding with his automobile. At one point in the trial

Hobart said it was the truck's right bumper that hit his left front bumper. Later he changed this testimony, stating that it was the left front side of the truck that collided with the left front side of his automobile. Irma B. Hobart, the appellant's wife, who was riding in the automobile with him gave the same general description, except that she testified specifically that the left front of the truck hit the left front of the Hobart automobile.

O'Brien, on the other hand, testified that he was traveling approximately 25 miles an hour, that he was on the "right side" of the road and that the Hobart car came towards him, hitting the left front side of his truck. He further testified that the force of the collision pulled the wheel out of his hands and "swung the truck completely around," throwing him to the right side of the cab.

On cross-examination O'Brien testified as follows:

"X-Q. You have said, at one time, have you not, that the Hobart car was in its right lane, in the center lane, have you not? A. I said the right lane.

X-Q. Was it in its right lane? A. Yes, that's right.

"X-Q. And that, at the time of the collision? A. No, not at the time of the collision."

Joseph Mullaney, a co-employee of O'Brien who was riding with him in the truck, testified that he was looking out the window to his right and did not see the Hobart automobile prior to the moment of impact. But he did state that "there was a crash" and the truck swerved to the left, throwing O'Brien on his lap.

Whitney, who was traveling some distance behind Hobart, on direct examination stated that Hobart was driving in the center lane at the time of the collision and that the O'Brien track, traveling with the two left wheels in the center lane drove into the Hobart automobile. However, on cross-examination he stated that the Hobart automobile turned to the left immediately prior to the accident, and that the collision occurred as it was turning.

Whitney's wife, who was riding with her husband, testified on direct examination that the O'Brien truck came into the center lane and hit the Hobart automobile, but, on cross-examination, she could not say whether the Hobart automobile turned or did not turn to the left at any time.

In addition to these eye-witnesses there was testimony from three state police officers who testified and submitted photographs as to the location and condition of the vehicles immediately following the accident and as to statements made by the parties at that time; the superintendent of the Concord Water and Sewer Department who described the nature of the construction and obstructions on the highway on that date; and an array of medical witnesses.

The rulings of the trial court and the evidence will be further developed in discussing the errors asserted by the appellant, which we now proceed to consider.

Mass. Ann. Laws c. 152, § 15 (1949), in pertinent part, provides:

> "* * * Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but, except as hereinafter provided, not against both. If compensation be paid under this chapter, the insurer may enforce in the name of the employee or in its own name and for its own benefit, the liability of such other person, and if, in any case where the employee has claimed or received compensation within six months of the injury, the insurer does not proceed to enforce such liability within a period of nine months after said injury, the employee may so proceed. * * * * * * * An employee shall not be held to have exercised his option under this section to proceed at law if, at any

time prior to trial of an action at law brought by him against such other person, he shall, after notice to the insurer discontinue such action, provided that upon payment of compensation following such discontinuance the insurer shall not have lost its right to enforce the liability of such other person as hereinbefore provided. * * * "

O'Brien, after filing his complaint on June 26, 1953, entered into an agreement on August 8, 1952 with his employer's insurer whereby the insurer agreed to pay him the benefits provided by the Massachusetts Workmen's Compensation Act for the injuries received in the accident. Accordingly, O'Brien received weekly payments, effective retroactively to June 23, 1952, until July 24, 1951 when his case was closed under a lump sum payment.

It was stated to the district judge at trial that upon O'Brien's agreement to receive workmen's compensation benefits, a duly authorized agent of the insurer "stated that he then wanted Mr. Nitkin [O'Brien's counsel] to understand that they were to be subrogated to the O'Brien case, which was then pending in the Federal Court and that he then wanted Mr. Nitkin to handle the case from then on on behalf of [the insurer] and as their attorney and that in due course if and when any moneys were received as a result of the case * * * the moneys were to be divided in accordance with Chapter 152, Massachusetts General Laws." It was further stated by an officer of the insurer "that no further actions of any kind of nature by way of new suits or new claims or other types of legal proceedings other than whatever may be necessary by way of appealing this case [will be taken by the insurer] against Dr. Hobart or against Mrs. Hobart."

Hobart unsuccessfully moved for summary judgment on October 13, 1954, claiming that under § 15 the insurer could not take over the action instituted by O'Brien. He contends in this connection that under § 15 O'Brien, upon agreeing to receive compensation benefits, had to discon-

tinue his action, that for a period of nine months after the injury the right to bring the cause of action rested in the insurer, and that O'Brien could commence the action again only if the insurer had not brought suit within the nine month period. If Hobart were to prevail in his argument that the insurer had no right to take over this action by agreement, but, rather, could only institute an action after discontinuance by O'Brien, he can escape liability altogether since the one year statute of limitations has run on the original cause of action. See *Broderick's Case*, 320 Mass. 149, 67 N.E.2d 897 (1946).

Initially we note that "Section 15 should be construed liberally to accomplish the purposes for which it was enacted." *Furlong v. Cronan*, 305 Mass. 464, 468, 26 N.E.2d 382, 385 (1940). Accordingly, it seems to us that the provision that an employee, in electing to receive compensation benefits, must discontinue prior to trial any action at law for the same injury, was not intended to aid the third party in escaping liability; rather, it was inserted to preserve the insurer's right of action against that third party. Here the insurer could have brought at the time O'Brien agreed to take compensation benefits, a new action against the third party, Hobart, since the statute of limitations had not run, as it had in *Broderick's Case*; instead it agreed to take over the action already commenced by O'Brien. By such agreement the insurer efficiently pursued its right of action under the statute with no prejudice resulting to Hobart.

However, Hobart would have us construe § 15 as requiring the discontinuance of the action initially brought by O'Brien, as a condition precedent to recovery from him, the third party wrongdoer. We reject this narrow construction for we believe that whether or not the insurer compelled O'Brien to comply with the formality of discontinuance, as it had a right to do under the statute, is not a matter that should work to the advantage of

Hobart in any way. As was said in *Becker* v. *Eastern Massachusetts St. Ry. Co.*, 279 Mass. 435, 441, 442, 181 N.E. 757, 759, 760 (1932):

> "The legal liability of a third person for an injury suffered by an employee is not created by the Workmen's Compensation Law and is not discharged by the employee's election to proceed against the insurer for compensation. The statute merely makes a transfer to the insurer of the employee's right to enforce such liability effective upon such insurer's paying compensation to the employee. The insurer, after such transfer, becomes, in substance, an assignee of the employee's cause of action. * * *. As in the ordinary case of an action at law brought in the name of an assignor of a cause of action, it is immaterial to the defendant whether the plaintiff is the real party in interest or a nominal plaintiff suing for the benefit of another. * * *
>
> "The defendant's only justifiable interest in the question whether the plaintiff is a nominal or real party is in being protected against double liability and not being required to defend an action prosecuted without authority. * * *."

The statements of O'Brien's counsel in open court, set forth above, and the concurrence therein by the insurer enabled the trial judge to see that Hobart was protected against double liability and that his rights were not prejudiced in any way. *Becker* v. *Eastern Massachusetts St. Ry. Co.*, *supra*. Moreover, the trial judge was the one to hear and determine the question of the authority of the insurer to prosecute an action at law in the name of the employee. *In re Nealon's Petition*, 1956 A.S. 650, 134 N.E.2d 886 (1956); *Becker* v. *Eastern Massachusetts St. Ry. Co.*, supra.

Since Hobart was not prejudiced by the insurer taking over O'Brien's cause of action, the trial judge properly allowed the insurer to continue the prosecution of the instant case notwithstanding that O'Brien had not discontinued his action. None of the cases cited by Hobart

in support of his argument present the exact problem before us, and we do not read anything in them that directly opposes our holding.

Next, Hobart contends it was error for the trial court to deny his motions for directed verdict and for judgment n.o.v. on the grounds that the evidence either failed to show negligence chargeable to him or that it showed contributory negligence as a matter of law, chargeable to O'Brien. He cannot prevail in this contention.

The principles which govern the consideration of motions for directed verdicts and judgments n.o.v. filed by defendants are stated in *American Fidelity & Casualty Company* v. *Dreyer*, 229 F.2d 930, 932, 933 (5 Cir. 1955):

> "* * * In determining whether or not the evidence in a given case is sufficient to take the case to the jury over a motion for directed verdict, the evidence must be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him which may be fairly drawn. It is not for the court to weigh the conflicting evidence or to judge the credibility of witnesses. Whenever the evidence is such that intelligent men may draw different inferences therefrom and reasonably disagree as to what the verdict should be, the matter is one for the jury. 'And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.' Lavender v. Kern, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916."

Applying these principles, it is apparent, we believe, from the mere summary of the testimony of the eyewitnesses, set forth above, that there was evidence in this case which would warrant a finding for the appellee. To the extent that there was conflicting evidence, the value of which depended on the credibility of the various witnesses, it presented a question for the jury. *Collins* v. *Neal*, 219 F.2d 288 (7 Cir. 1955). In this respect, Hobart's

confusion in describing the collision may have worked against him in the minds of the jury.

The jury could have found from the evidence that O'Brien at all times remained on the right side of the road and that Hobart turned to the left, thus causing the collision. This finding would be supported by O'Brien's testimony as well as portions of Whitney's testimony on cross-examination. Similarly, on the issue of contributory negligence the jury could have believed O'Brien's testimony that he was on the proper side of the road and in control of his vehicle. See *Merchants Motor Freight* v. *Downing*, 227 F.2d 247 (8 Cir. 1955). Nor do we believe that the pictures of tire marks and positions of the vehicles after the accident constitute physical facts which flatly contradict and therefore nullify the oral testimony. *Collins* v. *Neal*, supra.

Hobart, both as defendant and plaintiff, also moved for a new trial on the ground, among others, that the verdicts were against the law and evidence. Our views presented above insofar as pertinent apply equally well to these motions. In addition, we wish to state that "[a] motion for new trial is addressed to the sound judicial discretion of the trial court and the action taken thereon is not open to review on appeal unless it appears that there was an abuse of such discretion." *Thiringer* v. *Barlow*, 205 F.2d 476, 478 (10 Cir. 1953). There was no abuse of discretion in the denial of the motions in these cases.

Another ground for Hobart's motion for a new trial in these cases was that the verdict was influenced by wholly improper argument of appellees' counsel. In pursuing this contention on appeal, Hobart largely points to statements made by O'Brien's counsel in his summation to the jury and in a few instances to statements made by appellees' counsel during the course of the trial. Without conceding that the remarks in question exceeded the bounds of propriety, we believe that Hobart cannot resort to them on

appeal due to his failure to take timely objections to any of these statements at trial. See *Louisiana & Arkansas Ry. Co.* v. *Johnson*, 214 F.2d 290 (5 Cir. 1954), cert. denied 348 U.S. 875 (1954). In the absence of such objections the remarks of appellees' counsel are not available to him as grounds for reversal. Furthermore, it should be stated herein that during the trial the judge on his own initiative was quick to instruct the jury on occasion to disregard certain remarks of counsel for both sides.

Now we consider the rulings of evidence by the trial court which Hobart assigns as error. To a great extent these rulings are pertinent to both cases on appeal and we do not think it necessary to designate the particular relevance of each ruling.

Since the rulings generally deal with the admissibility or inadmissibility of particular items of proof, it is advisable to point out that Fed. R. Civ. P. 43(a) provides in pertinent part:

> " * * * All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. * * * "

First, Hobart asserts that it was error for the trial court not to allow him to present on cross-examination of O'Brien the complete details concerning statements made by O'Brien in a criminal proceeding in Concord District Court shortly after the accident.

On August 14, 1952 O'Brien had testified in Concord District Court that he did not see the Hobart automobile

in sufficient time to tell whether it was in his lane or in its own lane. At the trial of the instant case his testimony, as outlined earlier in this opinion, was to some extent inconsistent. For obvious reasons Hobart sought to confront O'Brien with this testimony on cross-examination.

The trial judge, after first refusing to allow in evidence anything concerning the August 14 testimony, later changed his mind and ruled that any statements made by O'Brien on that date could come in; further, he ruled that Hobart could identify the testimony by referring to the date when it was given and that it was made under oath and pains and penalties of perjury. However, he would not permit Hobart to state that it was made in the Concord District Court. Later, counsel for O'Brien conceded that Hobart could refer to "Concord" as the place where O'Brien gave the testimony.

The trial court's exclusion of the term "District Court" was based on the fact that since the ultimate disposition of the criminal proceeding in the Concord District Court "did not constitute a record of conviction that would be admissible" in the instant trial it would be prejudicial error to allow the jury to learn of the criminal proceeding.[1] In this connection he feared that the jury, upon learning that the testimony was given in the Concord District Court, might infer that O'Brien was involved in a criminal proceeding in that court. If the term "District Court" would result in such an inference, it is apparent that Hobart by indirection would be presenting to the jury a fact that could not otherwise be shown.

Upon the trial court's exclusion of the term "District Court", Hobart objected and, for reasons we cannot under-

[1] The inadmissibility of the ultimate finding of the Concord District Court and of the fact that there was a criminal proceeding was conceded by all counsel at the trial.

stand, refused to confront O'Brien with any portion of the Concord District Court testimony. Of course, his choice "to risk all" on this point cannot aid him on appeal. He has waived his right to confront O'Brien with an allegedly contradictory statement, as limited by the trial judge, and the issue before us is merely the one of whether the trial court's exclusion of "District Court" in these circumstances constitutes prejudicial error.

To support his argument Hobart cites many cases for the proposition that a trial court is under no obligation to protect a witness from being discredited on cross-examination. e.g. *Alford* v. *United States*, 282 U.S. 687 (1931). We think that this rule exists only as conditioned by the well established principle that the limits of cross-examination rest in the sound judicial discretion and control of the trial judge. See *United States* v. *Lawinski*, 195 F.2d 1 (7 Cir. 1952); *Davis* v. *Hotels Statler Co.*, 327 Mass. 28, 97 N.E.2d 187 (1951).

The trial judge's cautious exercise of discretion in this matter is understandable in light of the aforementioned rule that if evidence, which tends to show that a party has been exposed to a criminal prosecution as a result of a motor vehicles accident, is erroneously admitted in a civil action arising out of the same accident under circumstances where there was no "conviction" which can be shown as a matter of record, such error is prejudicial and not cured by a statement in the charge instructing the jury to disregard the fact of the criminal prosecution. See *Kagasck* v. *Bockus*, 293 Mass. 371, 199 N.E. 726 (1936).

Although we are not convinced that the jury necessarily would have inferred from the term "District Court" that O'Brien was involved in a criminal proceeding, upon weighing the interests in conflict here—the possibility of prejudice to O'Brien as opposed to the evidentiary value to Hobart—we cannot say that the trial court abused its discretion in excluding the term "District Court." Neither

do we believe, in light of the record, that this exclusion constituted prejudicial error since Hobart was afforded the opportunity to offer this testimony both for purposes of impeachment and as admissions, to show that the answers were made by O'Brien at a hearing under oath and under the pains and penalties of perjury and the date when such testimony was given. Indeed, the trial court was willing to permit the court stenographer to testify that these answers were made under oath by O'Brien at a hearing in her presence.

Certainly this is not a situation where the trial court's exclusion rendered the remainder of the evidence unintelligible to the jury. See *Commonwealth* v. *Catalda*, 326 Mass. 373, 94 N.E.2d 761 (1950); *Commonwealth* v. *West*, 312 Mass. 438, 45 N.E.2d 260 (1942). Moreover, we believe that those circumstances surrounding the contradictory testimony which were allowed by the trial court would have been sufficient to recall the particular occasion to the mind of the witness, O'Brien, if Hobart had confronted him with said testimony.

We conclude that no prejudicial error was committed by the trial court on this ruling.

The second ruling of the trial court assigned as error is the admission of certain testimony during the cross-examination of John H. Robinson, a witness for Hobart, concerning a prior statement he had made about the accident. The record, quoted below, shows that the trial court admitted this statement only for the purpose of impeaching credibility and that Hobart's counsel consented to the court's ruling:

> "The Court: You have no objection if it is admitted for the purpose of impeaching credibility?
> [Appellant's counsel] "Mr. Mahony: Impeaching credibility. I certainly do not.
> "The Court: Confine it to that.
> [Appellee's counsel] "Mr. Prendergast: Confine it to that. All right, thank you."

Now Hobart states in his brief that his counsel said "I certainly do" and not "I certainly do not," claiming that the record is in error. O'Brien, on the other hand, states that the record is correct. Under such circumstances we must abide by the record as it stands. If the record were in error, Hobart should have taken measures to correct it before submitting it on appeal. Absent such correction, we conclude that Hobart did not save his rights on this point.

The third ruling assigned as error by Hobart is the trial court's exclusion of his offer in evidence of a declaration filed by O'Brien in another action in Middlesex Superior Court brought by him against Robert Whitney, whose automobile was also involved in the accident, to recover for the same injuries for which the instant action was brought. In that declaration "the plaintiff [O'Brien] claimed that the defendant [Whitney] so negligently and unskillfully drove a motor vehicle on a public highway called Route 2, Concord, Mass., on the 21st day of June, 1952, and by reason thereof said motor vehicle struck the motor vehicle in which the plaintiff was then properly riding along said highway, and as a consequence of which the plaintiff was seriously and permanently injured." Hobart offered this declaration for the purpose of impeaching O'Brien's testimony in the instant trial where he stated that he saw Whitney's car on an incline about 800 feet away and did not see it again before the collision. Prior to this offer the trial court had permitted Hobart to confront O'Brien in cross-examination with certain answers he had given to interrogatories propounded in the Whitney action.

We cannot see any inconsistency between the O'Brien declaration, set forth above, in the Whitney action and his testimony at the instant trial and on that ground alone would affirm the trial court on its exclusion. But, even conceding some innate inconsistency between these two

statements, the declaration in the Whitney action would not be admissible. For a conventional declaration or formal allegation of negligence, such as we have here, "belongs to that class of formal statements which, in the absence of further proof, are assumed to have originated with counsel rather than to the class of statements of particular fact which can be inferred to have originated with the client himself."[2] *Jennings* v. *Bragdon*, 289 Mass. 595, 194 N.E. 697, 698 (1935). There exists no proof in this case that the statements in the declaration originated with O'Brien or were adopted by him.

Finally, Hobart contends that in light of 62 Stat. 957, 28 U.S.C. § 1961 (1952)[3] it was error for the trial court to deny his motion to strike the item of pre-judgment interest calculated from the date of the writ. This argument invites but brief consideration in view of the detailed treatment given this general problem by this court in *Sylvania Electric Products* v. *Barker*, 228 F.2d 842 (1 Cir. 1955), cert. denied 350 U.S. 988 (1956), *Moore-McCormack Lines* v. *Amirault*, 202 F.2d 893 (1 Cir. 1953) and by the Fifth Circuit in *New Amsterdam Casualty Co.*

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[2] For cases where it was held that the attorney was presumably acting under special authorization of his client because the statements set out a specific cause of action or defense, see *Johnson* v. *Russell*, 144 Mass. 409, 11 N.E. 670 (1887), *Clarke* v. *Taylor*, 269 Mass. 335, 168 N.E. 806 (1929). See also *Frank R. Jelleff, Inc.* v. *Braden*, 233 F.2d 671, 676 (D.C. Cir. 1956), where the other complaint "spoke specifically of the very garments involved in the present action."

[3] "§ 1961. *Interest*

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law. (June 25, 1948, c. 646, § 1, 62 Stat. 957.)"

v. *Soileau*, 167 F.2d 767 (5 Cir. 1948), cert. denied 335 U.S. 822 (1948).

These cases make it quite clear that, where, as here, the injury giving rise to the cause of action occurred in Massachusetts, and the federal court obtained jurisdiction through diversity, the substantive law to be applied by the district court is the law of Massachusetts. Mass. Ann. Laws c. 231 § 6B (1956), providing for interest from the date of the writ, is a part of that substantive law.

We have considered other arguments advanced by Hobarr as plaintiff-appellant and defendant-appellant, such as his argument that the damages were excessive, only to reject them as without merit. We do not think they call for separate discussion.

Judgments will be entered affirming the judgments of the district court.

JUDGMENT

McCarthy, D. J.

This cause having come on for trial before the court and a jury and the jury having rendered a verdict for the Plaintiff in the sum of sixty-one thousand dollars ($61,000.00), it is hereby

Ordered that judgment be and is hereby entered for the Plaintiff in the sum of sixty-one thousand dollars ($61,000.00) with interest thereon from June 26, 1952 to date in the sum of twelve thousand six hundred seventy-seven dollars and eighty-three cents ($12,677.83) and for his costs taxed at $

Dated at Boston this thirteenth day of December, 1955.

By the Court,

(s) David W. Walsh
Deputy Clerk

(s) William T. McCarthy
United States District Judge

MEMORANDUM ON MOTION FOR NEW TRIAL OR FOR JUDGMENT N.O.V. FILED BY THE DEFENDANT.

July 2, 1956.

McCarthy, D. J.

I have carefully studied the briefs filed by the parties in this case and have given thoughtful consideration to all the issues raised by these motions and the rights which were saved during the trial. It is my considered judgment that the motion for judgment n.o.v. is denied and the motion for a new trial filed by the defendant is denied upon the condition, however, that the plaintiff remit to the defendant the sum of $13,000. If this remittitur is not filed within twenty days of the entry of this order, then the order of the Court is that the motion for a new trial filed by the defendant is granted as to the issue of damages only.

PLAINTIFF'S REMITTITUR

Now comes the plaintiff in the above-entitled action and hereby remits to the defendant the sum of thirteen thousand ($13,000.00) dollars, in accordance with Order of the Court made on July 2nd, 1956.

(s) Michael P. O'Brien
Michael P. O'Brien, *Plaintiff*

By (s) Reuben H. Nitkin
By virtue of Power of Attorney dated December 13, 1955, copy of which is attached hereto.

AMENDED JUDGMENT

McCarthy, D. J.

After hearing upon defendant's motion to vacate judgment and in accordance with the memorandum of the Court dated June 26, 1957, it is hereby

Ordered judgment dated December 13, 1955, be and hereby is vacated and execution issued thereon be returned into this Court and

Further Ordered judgment be and is hereby entered for the plaintiff in the sum of Forty-eight Thousand Dollars ($48,000.00) with interest thereon from June 26, 1952, to December 13, 1955, in the sum of Nine Thousand Nine Hundred and Seventy-four Dollars and Forty Cents ($9,974.40) and for his costs taxed at $, and it is

Further Ordered that execution issued on this amended judgment shall be in the sum of this judgment less any partial satisfaction endorsed on the execution issued on the original judgment which execution has been returned into Court.

By the Court,

/s/ John B. Mcnulty, Jr.
Deputy Clerk

(s) William T. McCarthy
United States District Judge

Dated at Boston June 27, 1957.

Office - Supreme Court, U.S.
FILED
SEP 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 272

HAROLD HOBART,
Petitioner,
v.
MICHAEL P. O'BRIEN,
Respondent,

and

HAROLD M. HOBART,
Petitioner,
v.
JOHN G. DONOVAN, ET AL.,
Respondent.

REPLY BRIEF

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Supreme Court of the United States

October Term, 1957

No. 272

Harold Hobart,

Petitioner,

v.

Michael P. O'Brien,

Respondent;

Harold M. Hobart,

Petitioner,

v.

John G. Donovan, et al.,

Respondent.

REPLY BRIEF

Preliminary Statement

Counsel for Respondents in the "Preliminary Statement" of their "Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit", have referred to a small part of the testimony of the witnesses, Hobart, O'Brien, and Whitney, as same was given at the trial in the United States District Court for the District of Massachusetts. The purpose of said references to said testimony of said witnesses is obviously an effort to strengthen the position taken by counsel for Respondents (as testified to by the witness O'Brien, pages 61 & 62 of the Consolidated Rec-

ord Appendix), to the effect that Dr. Hobart's car veered to the left and that the left front of Dr. Hobart's car ran into the rear of the left front wheel of the truck driven by Mr. O'Brien.

As in the Courts below, counsel for Respondents have made much of the fact that Dr. Hobart was first called to the stand by his opponents, that he was honestly mistaken under pressure of examination, which in fact amounted to cross-examination, in saying that the right bumper of the truck driven by Mr. O'Brien hit the left front bumper of Dr. Hobart's car (pg. 273, Consolidated Record), and that later he changed his testimony, and stated that it was the left side of the truck that collided with the left side of his automobile (pg. 439 of the Consolidated Record). Counsel for the litigant, Hobart, at the trial in the United States District Court for the District of Massachusetts could very well have cross-examined Dr. Hobart after his opponents had called him to the stand in their case in chief. In doing so, they could very easily have caused him to bring out the way that this accident actually happened. Counsel for Respondents continue to attempt to uphold an outrageous judgment on the ground that when they called Dr. Hobart to the stand he made a mistake in testifying as to how the accident happened and that, in their opinion, their opponents made a mistake as a matter of trial strategy in waiting until Dr. Hobart was called as a witness for himself to state how this accident actually happened.

A smattering of the testimony of three witnesses cannot possibly give the picture of how this accident happened to this Honorable Court. There are six witnesses who testified at the trial of this case who were actually present at the collision in question (as referred to on page 8 of the Petition for Writ of Certiorari filed herein). The testimony of the police officers who investigated this collision, as referred to in pages 22 and 23 of said Petition

for Writ of Certiorari, is also tremendously important. The pictures of the vehicles and the roadway after the accident make it conclusive that a terrible miscarriage of justice has taken place in the case which is the subject of this Petition for Writ of Certiorari.

The following points are worthy of some consideration with regard to the accuracy of the Preliminary Statement in the Brief in Opposition to Petition for Writ of Certiorari.

Dr. Hobart, in describing the accident did not testify that he was travelling 25 to 30 miles an hour. His testimony as set forth on pages 439 and 440 of the Consolidated Record Appendix, was to the effect that when he first saw the truck driven by Mr. O'Brien, his automobile was travelling at a speed which he would judge to have been about 30 miles an hour, but that at the time of the accident his automobile, according to his best estimate, was going at a speed of only 5 miles an hour.

Pages 401 and 402 of the Consolidated Record Appendix sets forth the testimony upon which counsel for Respondents have drawn the conclusion that the witness Whitney "stated that the Hobart automobile turned to the left immediately prior to the accident and that the collision occured as it was turning". Mr. Whitney testified that Dr. Hobart's vehicle did not move out of the center lane up until the time that the accident happened. Other testimony from which the aforestated conclusion is reached resulted from Mr. Whitney saying "Yes Sir" to leading questions as a result of pounding cross-examination.

Argument

Re: Question 1.

DEROGATORY COMMENTS BY COUNSEL FOR MR. O'BRIEN AT TRIAL AS TIED IN WITH DEROGATORY COMMENTS IN CLOSING ARGUMENT.

It is respectfully submitted that it is not at all unfair for counsel for Petitioner to take the position that this Honorable Court should grant a reversal and a new trial on the ground that derogatory comments were made by counsel for Mr. O'Brien directed against Mr. Mahoney, of counsel for now Petitioner, at the trial in the United States District Court for the District of Massachusetts, and that said comments were tied in with those of a similar nature made in closing argument by counsel for now Respondents. The petition filed herein does not contend that verbal arrows were being hurled constantly. The contention of counsel for Petitioner is that the arrows which were hurled added up to an effort to make the jury believe that they could not trust so learned and honorable a gentleman as Mr. Mahoney.

The fact that counsel poked fun at each other regarding the close of the working day at 4:00 o'clock was separate and apart, it is respectfully submitted, from reference to "not telling the truth," "sneaking in words you never dreamed of," and "twisting the facts." Again, it is respectfully submitted that it is significant that the first two references to Mr. Mahoney that were made during the taking of testimony in the case and that the latter comment was made in closing argument, all as referred to on pages 4 and 5 of the Petition For a Writ of Certiorari filed in this Honorable Court.

It is respectfully submitted that the cases quoted on page 6 of Respondents' Brief in Opposition to Petition for Writ of Certiorari are far from compelling with regard to the case which is the subject of this petition.

The case of *Stanczak v. Pennsylvania Railroad Company*, 174 F. (2d), 43 (7th Cir.), involved a juror who had not given a truthful statement on voir dire examination. The United States Court of Appeals said that the record was not convincing that the juror's error was intentional. After the quotation set forth on page 6 of the Brief in Opposition to Petition for Writ of Certiorari from said case, the United States Court of Appeals for the 7th Circuit added the following:

> "The Court (meaning the trial court) did not abuse its discretion in overruling the Motion for a New Trial on the ground that the juror answered untruthfully on his voir dire".

It is respectfully submitted that there is no basis of comparison between a case involving a misstatement by a juror and a contention in a case regarding derogatory comments by counsel.

The case of *Union Electric Light and Power Company v. Snyder Estate Company*, D. C. 15, F. Supp. 379, involves a juror who was excused after which it developed that said juror was not the one who had been summoned but was in fact the brother of the one who had been summoned. Both the trial judge and counsel for both sides knew about this and no objection was taken. Again we have a far cry from law regarding the point now under consideration.

The U. S. Court of Appeals for the 5th Circuit held in the case of *Louisiana and Arkansas Railway Co. v. Johnson*, 214 F. (2d), 290, (5th Cir., 1954) *cert. den.* U. S. 875 (1954), that:

> "We have carefully examined the record in this case, and, while it may be that the learned District Judge at times showed some impatience or irritation with the claim of total defense which did not exist at point of law, we are further impressed with his fairness and we cannot sustain appellant's contention that its case was prejudiced by any claimed unfair manner in which the trial was conducted".

Thereupon, the quotation found at the bottom of page 7 of the Brief in Opposition to Petition for Writ of Certiorari was set forth. It is true that in the case of *Louisiana and Arkansas Railway Co. v. Johnson, supra*, the trial court had overruled an objection to argument of counsel for the plaintiff at the trial in the United States District Court. It is respectfully submitted that remarks made by counsel in said case could not possibly have had the same effect upon the jurors or the same degree of seriousness as a matter of law as did the derogatory comments by Mr. Prendergast which are the subject of present considerations.

The problem in the case which is the subject of this petition is that the comments regarding counsel for Dr. Hobart as tied in with similar comments during the closing argument by Mr. Prendergast, were such as to preclude Dr. Hobart from having a fair trial. The case of *London Guarantee and Accident Co., Ltd. v. Woolfe*, 83 F. (2d) 325, (8th Cir.), is a good example of a reversal by reason of improper and prejudicial argument to a jury. In said case on page 344, the Court of Appeals for the 8th Circuit refers to the case of *New York Central Railway Co. v. Johnson*, 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706, in which this Honorable Court dealt with the matter of attacks upon opposing counsel. In said case Mr. Justice Harlan F. Stone made it clear that the public interest requires that litigation be fairly and impartially conducted and that it is the duty of the trial judge to protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice. It is respectfully submitted that the comments by Mr. Prendergast regarding Mr. Mahoney precluded Dr. Hobart, as Mr. Mahoney's client, from the fair trial to which Dr. Hobart was entitled.

Re: Question 2.

ARGUMENT OF COUNSEL WHICH WAS OUTSIDE OF SCOPE OF EVIDENCE.

Counsel for Respondents, in making the statement "there was no argument of counsel for O'Brien which was outside the scope of the evidence", apparently do not understand or do not want to understand the contention made in the Petition for Writ of Certiorari to the effect that Mr. Prendergast in his closing argument quoted alleged testimony from the witness Robinson which, in fact, was not brought out in the trial of this case. Counsel for Petitioner believes that the fact that Mr. Prendergast's argument was outside of the scope of the evidence is clearly brought out on pages 16, 17 and 18 of the Petition for Writ of Certiorari filed in this Honorable Court.

Instead of denying the contention of counsel for Petitioner to the effect that Mr. Prendergast's argument was outside of the scope of the evidence, counsel for Respondents, in the Brief in Opposition to Petition for Writ of Certiorari, take the position that since counsel for Dr. Hobart did not raise the issue at trial same cannot be raised after trial.

It is respectfully submitted that it is entirely possible for counsel in the trial of a case to miss the full purport of remarks made in closing argument by one's opponent, but that if such statement is tremendously damaging to the litigant and if such statement is outside the scope of the evidence, same should be the basis of a reversal and new trial. This is particularly true where such arguments are calculated to arouse the passions and prejudices of the jury as was undoubtedly the case in the reference by Mr. Prendergast to the alleged testimony of the witness Robinson.

It is respectfully submitted that the cases referred to on page 2, of the Brief in Opposition to Petition for Writ of Certiorari do not overcome the fact that reference was

made to evidence allegedly introduced at trial by the witness, Robinson, which in fact was not so introduced. The same comments which are made in the prior point with regard to the case of *Louisiana and Arkansas Railway Co.* v. *Johnson, supra,* are applicable here. The case of *Thompson* v. *Bowles,* 123 F. (2d) 487, (8th Cir. 1941) *cert. den.* 315 U. S. 804, relies upon the case of *London Guarantee and Accident Co.* v. *Woelfle, supra.,* which said latter case relies upon the case of *New York Central Railway Co.* v. *Johnson, supra,* decided by this Honorable Court. The law regarding the issues of misconduct of counsel therefore narrows down to the question as to whether the litigant received a fair trial. Most assuredly the misquoting of alleged evidence in closing argument precluded Dr. Hobart from fairly and impartially conducted litigation.

In the case of *Dowell, Inc.* v. *Jowers,* 5 Cir. 182 F.2d 576, the United States Court of Appeals dealt with the question of allegedly prejudicial remarks made by the trial judge instead of the closing argument of counsel. It is respectfully submitted that said case does not furnish any justification or excuse for Mr. Prendergast having misquoted alleged evidence by the witness Robinson nor change the law as established by *New York Central Railway Co.* v. *Johnson, supra.*

Re: Question 3.

ARGUMENT OF COUNSEL INTENDING TO INCITE THE SYMPATHIES AND PREJUDICES OF THE JURORS.

It is respectfully submitted that a reading of the argument by Mr. Daley as set forth on page 500 of the Consolidated Record, and that part of the argument of Mr. Prendergast as set forth on pages 513, 514, and 515 of the Consolidated Record, constitutes arguments and comments by counsel calculated to arouse the passions and

prejudices of the jurors by presenting to them questions extraneous to the evidence.

The law regarding this point, it is respectfully submitted, is also governed by those principles set forth in the case of *New York Central Railway Co. v. Johnson, supra.*

Re: Question 4.

VERDICT OF JURY HAVING BEEN CONTRARY TO THE EVIDENCE AND TO THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

Counsel for Respondents have again referred to the testimony of only the witnesses Hobart, O'Brien, and Whitney in an effort to justify the conclusion which they submit to this Honorable Court, in the last paragraph on page 13 of their brief, to the effect that the jury was warranted in finding Dr. Hobart negligent and Mr. O'Brien free from contributory negligence.

Even at the expense of repitition, it must be said, in behalf of Dr. Hobart, that this case can only be understood when the testimony of all witnesses is read and the same tied in with the physical facts. Such a study brings one to the inescapable conclusion that Mr. O'Brien was at least guilty of such contributory negligence as to preclude him from being entitled to any recovery in this case.

In the Petition for Writ of Certiorari, under the argument regarding this point, it has been fully pointed out how utterly unworthy of belief is the story told by Mr. O'Brien to the effect that Dr. Hobart's car ran into the rear of the left front wheel of the truck driven by Mr. O'Brien. (Pages 61 and 62 of the Consolidated Record Appendix).

Again we are faced with the contention by counsel for Mr. O'Brien to the effect that Dr. Hobart should be

financially crippled by this enormous judgment because he first testified that it was the right front of Mr. O'Brien's truck which ran into his automobile. This was an obvious mistake which was later corrected. As stated hereinabove, counsel for Dr. Hobart could have taken him on cross-examination when he first appeared as a witness and straightened out this matter. It is most respectfully urged that the fact that a witness called by his opponent becomes confused should not be the basis of an outrageous judgment when the composite whole of the testimony in the case conclusively shows at least contributory negligence on the part of the other party to a collision.

Again, counsel for Respondents rely on their great talent in having broken Mr. Whitney to the point where he believed that he saw Dr. Hobart's car turn to the left just as the accident happened. Counsel for Respondents do not mention that Mr. Witney steadfastly testified (as did all witnesses excepting Mr. O'Brien himself) that Mr. O'Brien's truck was over to the left of the line which defined the lane in which he should have been traveling. (Pages 394, 395, 396, 399 and 400 of the Consolidated Record Appendix.)

It is respectfully submitted that it was Mr. O'Brien's negligence, and his negligence alone, which was the true cause of this accident, but that, at least, his failure to drive in the proper lane under the circumstances of the excavations on the north side of the road was such contributory negligence as to definitely bring him within the law as quoted on pages 30, 31 and 32 of the Petition for Writ of Certiorari and to preclude him from any recovery in this case. It is respectfully submitted that the contributory negligence on Mr. O'Brien's part is so clear that it was an abuse of discretion for the trial judge to refuse to grant a new trial and for the United States Court of Appeals for the 1st Circuit, in turn, to uphold the judgment of the court below.

CONCLUSION

Counsel for Respondents contend that counsel for Petition has failed to present with accuracy, brevity and clearness any considerations warranting a further review. The record of this trial, as shown in Volume I of the Consolidated Record Appendix consists of 499 pages of testimony, conferences at the bench, arguments and instructions by the Court to the jury. Volume II of the Consolidated Record Appendix includes the pictures which were introduced at trial. From a sincere study of all of this material, counsel for Petitioner has brought to the attention of this Honorable Court the vital reasons why this Honorable Court should exercise supervisory powers and preclude the terrible miscarriage of justice which would result should the judgment in this case be allowed to stand. It is also true that a full understanding of the collision in question and the discrepancies at the trial can only be accomplished by a reading of the testimony of the witnesses, other than the medical witnesses, by a review of references to the various discrepancies which occurred at trial, and by tying in the verbal evidence regarding the collision with the pictures in Volume II of the Consolidated Record Appendix. It is respectfully submitted that upon such a study, your Honors can come to only one conclusion, namely, that the ends of justice require the granting of the Writ of Certiorari.

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